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## The Turn Toward Congress in Administrative Law

Jack M. Beermann<sup>\*</sup>

Congress engages in an extensive and ever-increasing level of oversight of the activities of the Executive Branch.<sup>1</sup> Congress requires countless reports on the activities of agencies and other executive organs and regularly intervenes into disparate areas of administration with appropriations riders and other methods of control and signals of disapproval. The level of observation and supervision is high enough that it is appropriate to hold Congress responsible for a very high proportion of the activities of the Executive Branch.

Perhaps this understanding helps explain why Congress is thought to be the most disparaged branch. Everybody hates the boss, or at least pretends to. In fact, each branch of the federal government appears to be victimized by disparagement in proportion to the particular branch's bossiness—witness the historically low approval rating of the administration of George W. Bush, which has taken perhaps the most expansive view of presidential power (and thus the most responsibility for government action) in the history of the United States. As the President claims authority to act unilaterally and even disregard instructions from Congress, disparagement moves in the direction of the Executive Branch. As the Supreme Court asserts its authority to invalidate laws passed by Congress and the states, and overrule actions by the President, it draws the ire of the political community whose will is frustrated. In recent years, so much attention has been

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<sup>1</sup> See generally Jack M. Beermann, Congressional Administration, 43 San Diego L. Rev. 61 (2006).

paid to assertions of power by the President and the Supreme Court, Congress has been somewhat neglected, and despite the consistently low public approval ratings, it may no longer hold the title as the “most disparaged branch.”

My contribution to this conference is to analyze the power of Congress mainly through an administrative law lens with the aim of pointing out ways in which Congress has remained or become responsible for administrative law, and thus remains the expected target of disparagement. Congress has become more responsible in recent years, not because of any improvements or reforms it has undertaken, but rather because developments in administrative law have placed responsibility on Congress. Some of the most important developments in administrative law in recent years can be traced to reinforcement, by federal courts reviewing administrative action, of Congress’s primacy as the most powerful policymaking branch of the federal government. This movement in the law spans seemingly unrelated doctrinal areas, and is best explained as a continuing affirmation and reaffirmation of the superior legitimacy of Congress as policymaker. In particular, I focus on the Supreme Court’s decision in the global warming case, *Massachusetts v. EPA*,<sup>2</sup> as a good illustration of how Congress has remained in the figurative driver’s seat despite the Bush administration’s aggressive assertions of executive power and the often unrestrained behavior of the Supreme Court.

I do not mean to argue that the law has consistently moved in the direction of congressional primacy. I especially do not mean to argue that the federal courts have become comprehensively deferential to Congress. By and large, the Supreme Court has promoted its own agenda to the exclusion of deference to anyone else, including

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<sup>2</sup> 549 U.S. 497 (2007).

Congress, the Executive Branch and all branches of state governments.<sup>3</sup> However, in some areas of administrative law, the Court seems to have turned toward Congress and away from the Executive Branch. Perhaps this turn is not a genuine preference for deference to Congress but rather the result of a coincidence between Congress's views and those of the Court. Further, there are undoubtedly many circumstances in which courts rely on congressional intent as a smokescreen for the imposition of their own views. Strained reading of statutes and attribution to legislators of judges' interpretations and policy views are common. It may be difficult, in a significant number of situations, to discern whether a particular invocation of congressional intent is genuine. Thus, the fact that courts invoke congressional intent in support of their decisions does not necessarily support my thesis that the law has moved toward greater attention to Congress's wishes than to those of the Executive Branch.

There is no doubt, however, that the use of congressional intent as a justification for judicial action is ubiquitous, and this says something at least about perceived relative legitimacy. It seems pretty clear that congressional primacy is well-established as a normative principle, even if the courts depart, sometimes surreptitiously, from the principle in a significant proportion of cases.

Thus, this article takes issue with the title of this conference, Congress: The Most Disparaged Branch. As compared with policymaking in the Judicial and Executive Branches, Congress is the most democratic and legitimate of the three federal branches, including even the independent agencies which are supposed to be shielded from politics but instead may be the most political of all. In fact, a key argument of this paper is that

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<sup>3</sup> See Jack M. Beermann, The Supreme Common Law Court of the United States, xxx Public Interest Law Journal xxx (forthcoming 2008).

recent developments in administrative law exhibit a return to congressional primacy both in matters of interpretation and matters of policy, and that this is a good thing in terms of accountability and legitimacy.

This paper proceeds as follows. Part I is an introduction to the problem of aggressive judicial review of agency action in administrative law—should it be viewed as reinforcing congressional power or as an assertion of power by the federal courts? Part II is the meat of the paper, discussing key developments in administrative law that point toward greater attention to Congress’s preference and less deference to the Executive Branch. The two main developments discussed are the Court’s decision in the global warming case rejecting the EPA’s refusal to regulate greenhouse gases and the evolution of the rules governing judicial review of agency interpretations away from deference to the Executive Branch and toward greater concern for congressional intent. Part III contains further examples, discussed more briefly, of an increased turn toward congressional intent and brief discussions of some areas in which the Supreme Court does not appear to have Congress’s intent as its primary touchstone in regulatory controversies. Part IV is a conclusion that discusses ways in which Congress can be even more responsible for the output of the Executive Branch, mainly ways in which Congress should do a better job of guiding the courts in the areas discussed in this article.

## I. Courts and Congress

One overarching problem that this article must confront is the status of aggressive judicial review of the actions of the Executive Branch. At one time, it was generally understood that judicial review was a device employed by Congress to keep administrative agencies in line. As Cass Sunstein put it, “[a]ccording to the most

prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature.”<sup>4</sup> Courts were seen as enforcing the will of Congress against the Executive Branch. The problem with this viewpoint was that there was no account of why judges would act on Congress’s preferences rather than their own preferences, and if they were acting on their own preferences, the question then became whether judicial preferences were likely to be closer to Congress’s or to the preferences of the executive branch.<sup>5</sup>

The ability of courts to make decisions without relying on their own values has long been questioned, and recently the choice in judicial review has been seen as between the will of an unaccountable judiciary and the will of agencies that are at least somewhat accountable through the President. The *Chevron* doctrine, under which courts are supposed to defer to reasonable agency interpretations of ambiguous statutes, was expressly built on this foundation of greater political accountability in the Executive Branch.<sup>6</sup> However, to take the judiciary’s lack of political accountability as a reason to eliminate any role for courts in supervising the Executive Branch’s obedience to statutes would work a fundamental change in the traditional understanding of separation of powers and judicial review of agency action.

From Congress’s perspective, this dilemma may appear to be something of a catch-22. In most situations, Congress has no device for direct enforcement of its will

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<sup>4</sup> Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 Harv. L. Rev. 405, 415 (1989).

<sup>5</sup> See Jack M. Beermann, Interest Group Politics and Judicial Behavior: Macey’s Public Choice, 67 Notre Dame L. Rev. 183, 221-23 (1991).

<sup>6</sup> See *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 865-66 (1984) (“Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges’ personal policy preferences. . . . While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”)

against the Executive Branch. In some circumstances, Congress can try to go it alone against the Executive Branch, for example by using appropriations riders, earmarks and other similar devices to tie the hands of the executive. In other situations, especially when a measure of executive discretion is necessary to make a program workable, Congress must choose between relying on judicial review in the federal courts to enforce its will against that of the executive and allowing the executive virtually free reign. While sometimes the administration has strong incentives to cooperate voluntarily with Congress, in other contexts, the only way Congress's will can prevail is through judicial review of the actions of the Executive Branch. The problem from Congress's perspective involves the relative faithfulness of the two other branches of governments.

While there may be no way to resolve this problem definitively, there are some considerations that may help us find a way out of the apparent catch-22. First, it is important to recognize that many issues that come up on judicial review present themselves as conflicts between the will of the administration and the will of Congress, mediated by the courts. A good example of this is review of Executive Branch statutory interpretation. A court engaged in statutory interpretation can choose from among many interpretive paths. One path available is for a court to attempt in good faith to discern Congress's meaning, and to impose that meaning if it is confident that it has arrived at the best understanding of the statute. Of course, a court can always choose another path, for example by using statutory interpretation as an opportunity to impose its will behind a rhetorical smokescreen of Congress's intent or some other interpretive theory. The question is whether it is possible to discern which path the court has taken in any particular case.

Sometimes, it may seem pretty clear that the court has imposed its will as against both Congress and the Executive Branch. Other times, it may seem pretty clear that the court has deferred to the Executive Branch in the face of strong indications that Congress's will has been ignored. In still other circumstances, it may appear that the court has acted on its best estimate of what Congress intended or would have wanted in the particular situation. Although certainty is impossible, it is possible to have at least a good sense of which path a court has chosen in a particular case.

The thesis of this paper is that in many doctrines of administrative law, even including more recent applications of the (in)famous *Chevron* doctrine, the courts have chosen a path that favors Congress's will over that of the Executive Branch, at least when Congress's will is discernible (and perhaps also when the issues involved do not excite strong feelings on the courts). Further, as a theoretical matter, Congress's will has remained the touchstone of legitimacy even in those areas of maximum deference to administrative action. Even if attention to Congress's will is mere lip service, the necessity of such lip service is an indication of strength of the background principle of congressional primacy.

## II. *Massachusetts v. EPA* and *Chevron*.

### A. A Congress-centered understanding of *Massachusetts v. EPA*.

The Supreme Court's decision in *Massachusetts v. EPA*,<sup>7</sup> the global warming case, contains several strands that reinforce the bedrock principle of congressional supremacy in administrative law. By rejecting the Executive Branch's arguments for deference to administrative policy, and by relying on its understanding of congressional

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<sup>7</sup> 549 U.S. 497 (2007).



intent, the Court placed responsibility for global warming policy on Congress. In order to understand the importance of the decision, it is necessary to review it in some detail.

1. The EPA's Denial of the Petition to Regulate Greenhouse Gases.

The case began in 1999 when a group of environmentalists and states petitioned the EPA to make a rule that would treat global warming gases as air pollutants under the Clean Air Act.<sup>8</sup> Agencies are required by the Administrative Procedure Act to allow interested persons the opportunity to petition for the issuance of a rule.<sup>9</sup> The following year, the EPA requested comments on the petition, and it received over 50,000 responses.<sup>10</sup> The EPA also requested a scientific report from the National Research Council on global warming gases, and in 2001 the Council issued a report that concluded that greenhouse gases were accumulating in the atmosphere as a result of human activities and that world temperatures were rising as a result.<sup>11</sup> However, in 2003 (well after the changeover from the Clinton administration to that of President George W. Bush) the EPA formally denied the petition on two grounds, first that EPA lacked statutory authority to regulate greenhouse gas emissions and second that even if it had such statutory authority it would not, as a matter of policy, choose to regulate them at the time.

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<sup>8</sup> All of the details concerning the case are, unless noted otherwise, drawn from the Court's opinion in *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>9</sup> 5 U.S.C. § 553(e).

<sup>10</sup> No statute or rule required EPA to seek comments on the petition. Agencies are free, however, to add to the procedures prescribed by Congress, and given the importance and complexity of the issues addressed in the petition, the agency was wise to ask for comments before ruling on the petition. Note that courts may not require agencies to add to the procedures required by statute or rule, except in "extremely compelling circumstances" which thus far have never been found to exist. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978).

<sup>11</sup> See National Research Council, *Climate Change: An Analysis of Some Key Questions* (2001), cited in *Massachusetts v. EPA*, 549 U.S. at xxx.

The EPA's decision that it lacked statutory authority to regulate greenhouse gases was based on several factors. First, the EPA relied on the fact that Congress rejected a 1990 proposed amendment to the Clean Air Act setting binding greenhouse gas limitations and instead authorized further investigation into climate change. According to EPA, this congressional focus on global warming gases indicated that Congress had chosen a special path for regulating greenhouse gases and thus they could not be regulated under the general terms of existing regulatory statutes. EPA here analogized to the Supreme Court's reasons for denying the Food and Drug Administration the authority to regulate tobacco products, that the history of tobacco specific legislation indicated that the FDA lacked authority over tobacco under its general grant of power over drugs and devices.<sup>12</sup> Second, EPA concluded that as a textual matter the term "air pollutants" in the Clean Air Act did not include global warming gases. The EPA's view was that air pollutants are those things that dirty the air when they are released, not substances that cause problems when they collect in the upper atmosphere.

The EPA next stated that even if it had the statutory authority to regulate greenhouse gases, it would decline to do so for policy reasons. The EPA relied on several bases for this policy conclusion. First, it found great enough scientific uncertainty over whether greenhouse gases actually cause global warming to justify inaction at this time. Second, it was concerned that focusing on motor vehicle emissions, which would be required if it granted the petition, would amount to "piecemeal" regulation and that the Bush administration preferred to take a "comprehensive" approach to global warming. The President's preferred approach included support for

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<sup>12</sup> This is the argument that the Court found persuasive for denying federal regulatory authority over tobacco products in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). This is discussed in more detail infra note x and accompanying text.

technological innovation, encouraging voluntary greenhouse gas reductions and further research. Third, the President was apparently also concerned that EPA regulation might complicate efforts to engage other countries in the process of reducing greenhouse gas emissions.

## 2. The Reviewability Problem.

The statutory structure underlying the EPA's regulatory authority creates serious doubts over the amenability to judicial review of the agency's denial of the rulemaking petition. The Clean Air Act provides that the administrator of the EPA shall prescribe standards for the emission of any air pollutant from vehicles "which *in his judgment* cause[s] . . . air pollution which may reasonably be anticipated to endanger public health or welfare."<sup>13</sup> Note that the statute does not require the EPA to regulate all air pollutants that endanger public health or welfare. Rather, regulation is conditioned on a prior judgment by the Administrator of the EPA concerning the health or welfare effects of the particular pollutant.

This structure raises serious reviewability problems. The first problem is a general administrative law problem—is the denial of a petition for rulemaking reviewable? The second problem is particular to this provision (and similarly-worded provisions)—is the administrator required to act (and can a court compel the administrator to act) before he or she has made a judgment concerning the health or welfare effects of the alleged pollutant? The second problem is exacerbated by the fact that there is no explicit statutory standard governing when, if ever, the administrator is required to make a judgment concerning the effects of a pollutant. The lack of a statutory standard, together with the reference to the administrator's judgment, could be taken as an

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<sup>13</sup> 42 U.S.C. § 7521(a)(1) (emphasis supplied).

indication that a decision is committed to agency discretion and thus not subject to review.

The Supreme Court resolved all of these questions in favor of reviewability. On the first issue, the general issue of reviewability of denials of rulemaking petitions, the Court agreed with the D.C. Circuit's longstanding rule that the denial of such petitions is reviewable.<sup>14</sup> The Court rejected the argument that the denial of a rulemaking petition should be treated the same as a decision not to take enforcement action against a particular alleged violator of a regulatory scheme:<sup>15</sup>

There are key differences between a denial of a petition for rulemaking and an agency's decision not to initiate an enforcement action. See *American Horse Protection Assn., Inc. v. Lyng*, 812 F. 2d 1, 3–4 (D.C. Cir. 1987). In contrast to nonenforcement decisions, agency refusals to initiate rulemaking “are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.” *Id.*, at 4; see also 5 U.S.C. § 555(e). They moreover arise out of denials of petitions for rulemaking which (at least in the circumstances here) the affected party had an undoubted procedural right to file in the first instance. Refusals to promulgate rules are thus susceptible to judicial review, though such review is “extremely limited” and “highly

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<sup>14</sup> The Court adopted the D.C. Circuit's reviewability doctrine exemplified by *See American Horse Protection Assn., Inc. v. Lyng*, 812 F.2d 1, 3–4 (C.A.D.C.1987), cited in *Massachusetts v. EPA*, 549 U.S. at xxx.

<sup>15</sup> Decisions not to take enforcement action against a particular alleged violator are presumptively unreviewable under *Heckler v. Chaney*, 470 U.S. 821 (1985). They are reviewable if the regulatory statute provides a clear statutory standard against which the reviewing court can measure the agency's decision not to take enforcement action. See *id.*, 470 U.S. at 833–35, discussing *Dunlop v. Bachowski*, 421 U.S. 560 (1975).

deferential.” National Customs Brokers & Forwarders Assn of America, Inc. v. United States, 883 F. 2d 93, 96 (D.C. Cir. 1989).<sup>16</sup>

The Court added that Congress had provided in the Clean Air Act for judicial review of denials of rulemaking petitions.

“[T]he Clean Air Act expressly permits review of such an action. §7607(b)(1).

We therefore ‘may reverse any such action found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’ ” §7607(d)(9).<sup>17</sup>

The Court’s decision that denials of rulemaking petitions are reviewable and are not analogous to decisions not to take enforcement action, which are presumptively unreviewable, resolved an important lingering question in administrative law. Before getting to the heart of this matter, however, it is necessary to address the Court’s assertion that the “Clean Air Act expressly permits review of such an action.”<sup>18</sup> This assertion is curious since the Court mentions this basis for reviewability only after its broad pronouncement that rulemaking petition denials are reviewable and distinct from refusals to take particular enforcement action. Had the statute really expressly provided for review, there would have been no need to resort to the general reviewability principles under which the Court distinguished rulemaking from enforcement.

Further, there is little if any statutory support for the assertion. The statutory provision cited for the assertion that Congress has expressly provided for review, 42 U.S.C. §7607(b)(1), does not specifically mention review of rulemaking petition denials and appears to be a jurisdictional provision, allocating review of EPA rules between the D.C. Circuit (for rules of national applicability) and the other circuits (for locally or

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<sup>16</sup> Massachusetts v. EPA, 549 U.S. at xxx.

<sup>17</sup> Id. at xxx.

<sup>18</sup> Id. at xxx.

regionally applicable actions). The Court's discussion of the provision is cryptic, and seems to conflate jurisdiction with reviewability. The statute directs that, *inter alia*, petitions for review of standards promulgated under 42 U.S.C. §7521 (the statute under which the regulation of greenhouse gases was sought) and petitions for review of "any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter" must be filed in the D.C. Circuit.<sup>19</sup> The Court must have concluded that the denial of a petition for the promulgation of a standard is "final action taken . . . by the Administrator under this chapter" and that §7607(b)(1) is a statute providing for judicial review rather than simply a jurisdictional provision as its language indicates.

This statute has been characterized by lower courts in three different ways, although it is unclear how the D.C. Circuit would understand it if anything important turned on it. In some cases, it is characterized as providing for reviewability.<sup>20</sup> In other cases, it is presented as a venue provision, allocating cases among the circuits.<sup>21</sup> In still other cases, it is portrayed as jurisdictional, conferring jurisdiction on the D.C. Circuit over some petitions for review, and on the other circuits over other such petitions.<sup>22</sup> In *Massachusetts v. EPA*, the D.C. Circuit was careful to confine its discussion of

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<sup>19</sup> 42 U.S.C. §7607(b)(1).

<sup>20</sup> "The Sierra Club now petitions for review. *See* 42 U.S.C. § 7607(b)(1) (authorizing petitions for review of EPA's promulgation of emission standards)." *Sierra Club v. Environmental Protection Agency*, 479 F.3d 875, 880 (D.C. Cir. 2007).

<sup>21</sup> "We conclude that § 7607(b)(1) is a matter of venue, not jurisdiction; since EPA raised no objection, the provision is no bar to our review." *Texas Mun. Power Agency v. E.P.A.* 89 F.3d 858, 862 (D.C. Cir. 1996).

<sup>22</sup> "Our jurisdiction extends to "any ... nationally applicable ... final action taken by" the EPA Administrator." 42 U.S.C. § 7607(b)(1)." *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1021 (D.C. Cir. 2000); "Sierra Club now petitions for review of both actions pursuant to the jurisdictional grant of 42 U.S.C. §7607(b)(1)." *Sierra Club v. Environmental Protection Agency*, 356 F.3d 296, 300 (D.C. Cir. 2004).

§7607(b)(1) to the issue of jurisdiction.<sup>23</sup> It held that it had jurisdiction over the petition for review because the denial of the petition for the promulgation of a rule was final, and that it was an “action taken . . . by the Administrator under this chapter.” The D.C. Circuit did not bother to discuss reviewability, probably because it was well-established in that court that denials of rulemaking petitions are reviewable. It appears that the Supreme Court may have misunderstood §7607(b)(1) when it concluded that it provided an express statutory basis for reviewability. At a minimum, more analysis was needed.

On the general issue of reviewability of rulemaking petition denials, as noted above, although the matter had been settled for some time in the D.C. Circuit, it was unclear whether the Supreme Court was going to distinguish denials of rulemaking petitions from decisions not to take enforcement action which are presumptively unreviewable. Interestingly, the bases upon which the Court distinguished the two actions do not engage the basis upon which the Court had found refusals to initiate enforcement action to be presumptively unreviewable. The basis for the presumption that enforcement decisions are unreviewable is that there is unlikely to be law to apply to the

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We should say a few words about our jurisdiction under the Clean Air Act to review an EPA denial of a petition for rulemaking. Section 307(b)(1), 42 U.S.C. § 7607(b)(1), gives this court exclusive jurisdiction over “nationally applicable regulations promulgated, or final action taken, by the Administrator” under chapter 85 of the Act. The district courts, on the other hand, have jurisdiction over citizen suits to compel EPA to perform nondiscretionary acts or duties. 42 U.S.C. § 7604(a)(2); *see Sierra Club v. Thomas*, 828 F.2d 783, 787-92 (D.C.Cir.1987). Because EPA refused to promulgate “nationally applicable regulations” after being asked to do so, we have jurisdiction only if EPA thereby engaged in “final action.” We can be sure that its denial of the rulemaking petition was “final.” But did this constitute agency “action”? . . . The term “action” in § 307(b)(1) of the Clean Air Act, like the term “final,” carries its traditional meaning in administrative law. . . . Section 551(13) of the APA defines “agency action” as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or *denial thereof*, or failure to act” (*italics added*). . . . EPA’s denial of the rulemaking petition was therefore “final action,” and since the petition sought regulations national in scope, § 307(b)(1) confers jurisdiction on this court to hear these consolidated cases.

*Massachusetts v. E.P.A.*, 415 F.3d 50, 53-54 (D.C. Cir. 2005).

agency's decision of whether to take any particular enforcement action.<sup>24</sup> Most criminal and regulatory statutes, even when they use words like "shall" are understood as not requiring enforcement or prosecution in response to every known violation. Rather, it is understood that that prosecutors and regulatory enforcers have a great deal of discretion over when and whom to prosecute.

In support of the presumption that there is no law to apply to decisions by regulatory agencies not to bring enforcement actions, the Court has stated that "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise [such as] whether agency resources are best spend on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all."<sup>25</sup> Because these reasons apply to virtually every exercise of agency enforcement discretion, this reasoning may appear to mark out prosecutorial discretion as a category of agency action that is never subject to review. This is not so. As the Court explained, it meant to create only a presumption that agency decisions not to prosecute are unreviewable, and in some circumstances such decisions are subject to review: "[W]e emphasize that the decision is only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers."<sup>26</sup> When a regulatory statute contains criteria

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<sup>24</sup> See *Heckler v. Chaney*, 472 U.S. at 830-31.

<sup>25</sup> *Heckler v. Chaney*, 472 U.S. at 831-32. These reasons do not appear to be related to whether law exists governing the agency decision, but the Court made it clear elsewhere in its discussion that the lack of law to apply to evaluate the agency's exercise of discretion concerning these issues was the basis for the decision against review.

<sup>26</sup> *Heckler*, 472 U.S. at 832-33.



governing the agency's decision whether to take enforcement action, the Supreme Court has concluded that judicial review of the refusal to enforce is available.<sup>27</sup>

Given the Court's previous attention to whether there is law to apply in the context of enforcement decisions, it might be expected that the Court would discuss reviewability of rulemaking petition denials on the same basis, by asking whether there is typically law to apply in such situations. As it turned out, none of the four factors the Court relied upon, all drawn from the D.C. Circuit's bases for distinguishing enforcement from rulemaking petition denials, relate to the existence of law to apply: the denials of rulemaking petitions are "less frequent, more apt to involve legal as opposed to factual analysis, . . . subject to special formalities, including a public explanation, . . . and the affected party had an undoubted procedural right to file [the petition] in the first instance."<sup>28</sup> Frequency, formality and right to file do not relate at all to the existence of law to apply. Only the more likely legal nature of the decision arguably relates to whether there is likely to be law to apply, but in truth is probably does not. When facts are involved, agency factfinding might be entitled to deference, but the existence or non-existence of facts does not appear to be related to the likelihood that law exists in the particular area in which the facts arise. Thus, none of these reasons address whether there is more likely to be law to apply to the denial of a rulemaking petition than to the refusal to take a particular enforcement action or whether resource allocation issues are less severe in the rulemaking context than in the enforcement context.

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<sup>27</sup> See *Dunlop v. Bachowski*, 421 U.S. 560 (1975). This is why Justice Scalia's assertion in his separate opinion in *Webster v. Doe*, 486 U.S. 592, 609-10 (1988) (Scalia, J., dissenting), that *Heckler* imposed a categorical bar to review of enforcement decisions is clearly wrong. Unfortunately, he later convinced the majority of the Court to adopt his erroneous view. See *Lincoln v. Vigil*, 508 U.S. 182 (1993) (allocation of funds from a lump-sum appropriation is a category of action that is traditionally regarded as committed to agency discretion by law and is thus unreviewable).

<sup>28</sup> *Massachusetts v. EPA*, 549 U.S. at xxx.

This exposes a fundamental challenge to the entire analysis. Because the applicable provision of the Clean Air Act did not contain a legal standard governing the decision on the petition, to get over the “no law to apply” problem, the Court needed to create a legal standard. As we see in the next subsection, the one it created is centered on fulfilling Congress’s intent behind the applicable regulatory program.

### 3. Substantive Review of EPA’s Denial of the Rulemaking Petition: Congress-centered Review.

As noted, the governing provision of the Clean Air Act requires the agency to promulgate a standard only after the administrator makes a judgment that a pollutant is reasonably likely to endanger public health or welfare.<sup>29</sup> Nothing in the statute addresses when or if the administrator is required to make a judgment. EPA thus argued that the denial of the petition was unreviewable because, absent a governing statutory standard, the decision whether to make a judgment was completely discretionary with the agency. A less extreme version of the EPA’s position is that in such a situation, any rational (non-arbitrary or capricious) basis should be sufficient to uphold the EPA’s decision not to make a judgment. In this light, the EPA’s stated reasons for denying the petition, including a preference for addressing other priorities first or for dealing with the problem in other ways, should be sufficient.<sup>30</sup>

From the petitioners’ perspective, this would allow the EPA to dodge the global-warming issue indefinitely, or at least for as long as it could get away with it from a

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<sup>29</sup> 42 U.S.C. § 7521(a)(1).

<sup>30</sup> The EPA also concluded that global warming gases are not air pollutants. In its view, air pollutants are those things that dirty the air when they are released, not substances that cause problems when they collect in the upper atmosphere. The majority rejected this conclusion in a footnote, characterizing it as “a plainly unreasonable reading of a sweeping statutory provision.” See *Massachusetts v. EPA*, 549 U.S. at xxx, n. 26.

political standpoint. Rather than allow EPA to avoid the question this way, the Court construed the statute in light of its best estimate of how Congress expected the statute would work. Thus, the lack of an explicit statutory standard governing when the administrator is required to make a judgment is one location in which the Court recognized congressional primacy. This is most pointed in the Court's answer to the EPA's determination that even if it had statutory authority to regulate global warming gases it would choose not to. The Court decided that the decision whether to make a judgment concerning the harmful effects of an alleged pollutant should be based on the same exact statutory standard that governs the judgment itself:

While the statute does condition the exercise of EPA's authority on its formation of a "judgment," 42 U. S. C. §7521(a)(1), that judgment must relate to whether an air pollutant "cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare," *ibid.* Put another way, the use of the word "judgment" is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.

[O]nce EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute. Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. *Ibid.* To the extent that this constrains agency

discretion to pursue other priorities of the Administrator or the President, this is the congressional design.<sup>31</sup>

With these words, the Court swept away the agency's concerns about scientific uncertainty, piecemeal regulation and international coordination, as well as the President's stated preference for voluntary action on greenhouse gases.

Jody Freeman and Adrian Vermeule have characterized the Court's reasoning here as "expertise forcing" since it requires the agency to exercise technical discretion over the harmful effects of global warming gases rather than decline to regulate for reasons unrelated to the actual effects of global warming gases.<sup>32</sup> They are no doubt correct in this particular case, but the more general principle that one should take from this discussion is that when an agency decides whether to take even preliminary steps in the regulatory process that might lead to rulemaking, it must consider Congress's factors rather than the agency's or the administration's preferred factors.

Of course, most of the time Congress will direct the agency to apply its expertise to the technical issues involved in the rulemaking, and courts conducting judicial review in all contexts should require agencies to apply their expertise in line with the factors and issues specified by Congress. The APA's generally applicable "arbitrary and capricious" standard is understood as requiring agencies to consider the relevant factors and implicitly to not consider irrelevant factors. The range of relevant factors should be understood as coming from Congress as embodied in the applicable statutes. After *Massachusetts v. EPA*, agencies may not be allowed to rely upon extra-statutory factors, even if a reasonable administrator would find those factors important in making a

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<sup>31</sup> *Massachusetts v. EPA*, 549 U.S. at xxx.

<sup>32</sup> Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise* 2007 Sup. Ct. Rev. 51.

decision. Because Congress normally expects agencies to apply their expertise to the statutorily specified issues and factors, this entire enterprise can be characterized, in Freeman and Vermeule's terms, as "expertise forcing."<sup>33</sup>

This raises the immediate question of whether the Court's decision is really based on Congress's intent or on a constructed version of that intent, which in truth advances the Court's policy views that happen to be in conflict with those of the agency. Did the majority really believe that Congress intended statutory factors to govern the agency's decision on whether to make a judgment or was the majority simply convinced that the seriousness of the global warming problem demanded action, or perhaps more generally that statutes should not be read to allow administrative agencies to drag their heels in the face of serious issues? The dissenters have a strong argument that because Congress said nothing about when the agency is required to make the judgment that might trigger the obligation to engage in rulemaking, Congress's intent, if there was any, was to leave the decision to the agency's discretion under whatever factors the agency might find relevant.

While it is undoubtedly true that in many situations courts attribute their own views to Congress, in this case there are good reasons to conclude that the Court's view that the agency must decide based on statutory factors is likely to be more consistent with Congress's intent than the agency's view. The agency's view was that in the absence of an explicit statutory standard governing the decision whether to make the judgment that might lead to rulemaking, it is in the agency's complete discretion whether to make the judgment that might or might not lead to regulation. The dissent was only slightly more moderate than that, assuming "for the sake of argument, that the Administrator's discretion in this regard is not entirely unbounded—that if he has no reasonable basis for

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<sup>33</sup> See *id.*

deferring judgment he must grasp the nettle at once.”<sup>34</sup> The question is which view among the three offered is more likely to be consistent with what Congress would have wanted. Would Congress have wanted the agency to have the power to avoid the obligation to prescribe a standard by simply failing, with no explanation, to make a judgment concerning the likely effects of global warming gases? Would Congress have wanted the agency to have the power to avoid prescribing a standard on any reasonable basis, even one not contemplated by the statute, such as the President’s preference to address global warming through voluntary international agreements rather than regulation under the statute? Or, would Congress have expected that the agency would decide whether to make a judgment based on the factors Congress had prescribed for the judgment itself, namely the probable dangerousness of global warming gases to health or public welfare?

These questions foreshadow the more general discussion below concerning the evolution of the *Chevron* doctrine away from acceptance of the view that Congress intended to delegate broad power to agencies to construe ambiguous statutes. Contrary to the implications of the simplistic view of *Chevron*, when the question of congressional intent is boiled down to a choice among competing interpretations, often the courts appear to be more attuned to congressional intent than the agencies, which can be under significant political pressure that pulls away from the Congress’s interpretive preferences. In *Massachusetts v. EPA*, the reviewing court chose an interpretation anchored in statutory text, while the agency offered an interpretation grounded in the administration’s own priorities and general principles of administrative law. While undoubtedly the Court may have gotten it wrong, it appears that it was doing its best to work with Congress to

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<sup>34</sup> *Massachusetts v. EPA*, 549 U.S. at xxx (Scalia, J. dissenting).

achieve the goals embodied in the statute rather than advance an agenda unrelated to those policies.

The established rule that judicial review of decisions not to take enforcement action is available when Congress has specified statutory criteria for enforcement together with the *Massachusetts v. EPA*'s holding that denials of petitions for rulemaking are reviewable under the statutory criteria governing the substance of the requested rulemaking establishes congressional primacy in both of these areas of agency discretion.<sup>35</sup> It has more bite in the rulemaking context, because review is more likely than in the enforcement context, but in both areas, if Congress has specified the criteria for decisionmaking, the courts are required to enforce those criteria in the face of contrary agency policies and preferences.

It should be apparent that this analysis leads to fundamental questions regarding relative power in the administrative process. Agencies have priorities, expertise, and limited budgets, and they function within policy frameworks established by both Congress and the President. The President's policies should influence agencies both because the President is the constitutional locus of executive power and because of the democratic value of agency accountability through the President. The location of executive power in the President does not, however, tell us how much influence Congress should have over the execution of the law. Agencies execute the law, they don't make it, and nothing in the nature of executive power authorizes the President to push agencies to

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<sup>35</sup> I leave to one side the question of the appropriate standard of review in these cases. The Supreme Court has stated that the standard of review both of decisions not to undertake rulemaking and decisions not to take enforcement action (where the decision is reviewable because statutory standards are present) is very deferential, much more deferential than the usual understanding of the arbitrary and capricious test. This allows for a great deal of discretion agency application of the statutory standards governing the decisions in these areas and thus reduces the degree of actual congressional control.

ignore or short change Congress's expressed preferences. There is no sensible view of separation of powers that would favor impeding judicial review's ability to aid Congress in keeping agencies in line with legislatively expressed priorities. In fact, the opposite appears to be true, that separation of powers principles militate in favor of strong judicial review, assuming (and this is a big assumption) that judicial review pushes toward Congress's preferences rather than away from them.

Litigation surrounding the EPA's imposition of Total Maximum Daily Loads (TMDLs) under the Clean Water Act may help illustrate how evaluating the EPA's decision to make a judgment based on the statutory standards governing the judgment itself is likely to be supportive of congressional intent. Amendments to the Federal Water Pollution Control Act passed in 1972 required the EPA to identify pollutants that would be suitable for and thus subject to TMDLs within one year of the passage of the amendments.<sup>36</sup> The EPA did not identify the pollutants until 1978, after a court ordered it to do so,<sup>37</sup> and at that time the EPA took the easy way out and concluded that all pollutants are suitable for TMDL treatment.<sup>38</sup> The statute then required states to reply

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<sup>36</sup> 33 U.S.C. § 1313(d)(1)(C). As the Seventh Circuit in *Scott v. City of Hammond*, 741 F.2d 992, 996 (7<sup>th</sup> Cir. 1984), explained:

The statute requires states to submit proposed TMDL's within 180 days of the EPA's identification of pollutants to which TMDL's apply. CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2). The EPA's identifications of pollutants to which TMDL's apply were required by law to have been made by October 18, 1973, one year after the passage of the Federal Water Pollution Control Act Amendments of 1972. CWA § 304(a)(2)(D), 33 U.S.C. § 1314(a)(2)(D). EPA finally made the necessary identifications on December 28, 1978, apparently under court order. *See* Brief for Appellant at 24. Thus, state submissions were due on June 26, 1979. The states involved here (Illinois and Indiana) have not as yet submitted proposed TMDL's.

<sup>37</sup> *See* Oliver A. Houck, *The Clean Water Act TMDL Program: Law, Policy and Implementation* (1999), citing *Board of County Comm'rs v. Costle*, N. 78-0752, slip op. (D.C.C., June 20, 1978) (cited in *Total Maximum Daily Loads Under Clean Water Act*, 43 Fed. Reg. 42,303 (Sept. 20 1978)). Professor Houck's book provides an excellent overview of the TMDL program and the EPA's and States' recalcitrance in implementing it.

<sup>38</sup> 43 Fed.Reg. at 60,665. The description of the TMDL program is drawn largely from the Seventh Circuit's opinion in the *Scott* case. *See Scott v. City of Hammond*, 741 F.2d 992 (7<sup>th</sup> Cir. 1984).



with proposed TMDLs for pollutants in their waters within 180 days. The statute specified that the EPA was then required to either approve the state submissions or disapprove them and promulgate substitute TMDLs. By 1984, more than five years behind schedule, Illinois and Indiana had not yet submitted proposed TMDLs. In response to a lawsuit demanding action by the EPA, that agency took the position that it was not required to act because there were no proposed TMDLs for it to review. The Seventh Circuit rejected EPA's argument, and held that the EPA might be required to act even in the absence of state submissions if it appeared that by not submitting proposals, the states had decided that TMDLs were unnecessary.<sup>39</sup> This would then force the EPA to determine whether no TMDLs were consistent with the statute, and if EPA decided this in the negative, EPA would be required by statute to promulgate TMDLs itself. In support of this decision, the Seventh Circuit noted that "we do not believe that Congress intended that the states by inaction could prevent the implementation of TMDL's."<sup>40</sup> Similarly, it is unlikely that Congress intended the requirement that EPA act only after it has made a judgment as to the dangerousness of an air pollutant to grant the EPA virtually unreviewable discretion over which pollutants to regulate. Rather, in both cases, Congress more likely intended that the EPA would take into account the statutory purposes when deciding whether regulation was necessary and in what form.

Two decisions arising out of more recent actions concerning TMDLs illustrate how courts purporting to be attempting to do Congress's will can reach opposite results, highlighting once again how difficult it is to distinguish between judicial review that

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<sup>39</sup> See *Scott v. City of Hammond*, 741 F.2d 992 (7<sup>th</sup> Cir. 1984). See also *Hayes v. Whitman*, 264 F.3d 1017 (10<sup>th</sup> Cir. 2001) (agreeing that state failure to submit proposed TMDLs may amount to a constructive submission of no TMDLs).

<sup>40</sup> *Scott*, 741 F.2d at 997.

facilitates congressional control and judicial review that advances the courts' own policies (or at least defers to those of the Executive Branch). The two decisions involved the EPA's textually outlandish position that seasonal or annual limits satisfy the statutory obligation to promulgate total maximum *daily* loads for certain water pollutants.<sup>41</sup> This interpretation of the requirement was actually accepted by the Second Circuit, but rejected more recently by the D.C. Circuit. Although this is clearly an issue of statutory interpretation, the Second Circuit did not cite *Chevron* or purport to apply the *Chevron* standard when reviewing the EPA's determination that "daily" did not necessarily preclude an annual measure with seasonal adjustments. Rather, it applied the plain meaning rule and found that, under the traditional application of the plain meaning rule, interpreting "daily" to mean that pollutants must be measured on a daily basis would be absurd<sup>42</sup> and that therefore the agency was free to adopt a reasonable interpretation that better accomplished the statutory goal of pollution control.<sup>43</sup> The Court explained its application of the plain meaning rule as follows:

First, when determining which reasonable meaning should prevail, the text should be placed in the context of the entire statutory structure. . . . Second, "absurd results are to be avoided and internal inconsistencies in the statute must be dealt with." *United States v. Turkette*, 452 U.S. 576, 580 (1981); Such a reading strikes us as absurd, especially given that for some pollutants, effective regulation may best occur by some other periodic measure than a diurnal one. Accordingly, we agree with EPA that a "total maximum daily load" may be expressed by another measure of mass per time, where such an alternative measure best serves the purpose of effective regulation of pollutant levels in waterbodies.<sup>44</sup>

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<sup>41</sup> Compare *Natural Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001) with *Friends of Earth, Inc. v. E.P.A.*, 446 F.3d 140 (D.C. Cir. 2006).

<sup>42</sup> John F. Manning, *The Absurdity Doctrine* 116 Harv. L. Rev. 2387 (2003).

<sup>43</sup> See *Natural Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001).

<sup>44</sup> *Id.*, 268 F.3d at 98.

In a more recent decision, the D.C. Circuit rejected the EPA's conclusion that "daily" could mean annual or seasonal.<sup>45</sup> That court noted that the potential unsuitability of applying a daily measure to some pollutants was caused by the EPA itself, because the EPA had determined, perhaps unwisely, that all pollutants are suitable for the promulgation of TMDLs.<sup>46</sup> The court also rejected the Second Circuit's conclusion that applying the literal language of the statute would be absurd by noting that in its view, a statute is not absurd when it can sensibly be applied to many of the circumstances covered by its literal language.<sup>47</sup>

The D.C. Circuit's statutory interpretation discussion is worth reading:

Because Congress has charged EPA with the CWA's implementation, we review the agency's interpretation of the phrase "total maximum daily load" under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). . . . Critically, if "Congress has directly spoken to the precise question at issue ..., that is the end of the matter." *Chevron*, 467 U.S. at 842-43. So here.

We begin, as always, with the statute's language. For waters that fail to achieve water quality standards, *see* 33 U.S.C. § 1313(d)(1)(A), the CWA provides that "[e]ach state shall establish ... the total maximum *daily* load, for those pollutants which the Administrator identifies ... as suitable for such calculation," *id.* § 1313(d)(1)(C) (emphasis added). Because EPA has found "[a]ll pollutants ... suitable for the calculation of total maximum daily loads," 43 Fed.Reg. at 60,665, it follows that the CWA requires the District of Columbia to

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<sup>45</sup> *Friends of Earth, Inc. v. E.P.A.* 446 F.3d 140 (D.C. Cir. 2006).

<sup>46</sup> *Id.* at 146.

<sup>47</sup> *Id.*

establish a “total maximum daily load” for each pollutant that contributes to the Anacostia's violation of the dissolved oxygen and turbidity standards.

Nothing in this language even hints at the possibility that EPA can approve total maximum “seasonal” or “annual” loads. The law says “daily.” We see nothing ambiguous about this command. “Daily” connotes “every day.” *See Webster's Third New International Dictionary* 570 (1993) (defining “daily” to mean “occurring or being made, done, or acted upon every day”). Doctors making daily rounds would be of little use to their patients if they appeared seasonally or annually. And no one thinks of “[g]ive us this day our daily bread” as a prayer for sustenance on a seasonal or annual basis. *Matthew* 6:11 (King James).

When asked at oral argument how Congress could have spoken more clearly, EPA's counsel responded that “one way it could do that ... is to say that the ... total maximum daily load shall be expressed as a quantity per day or average per day or something like that.” Tr. of Oral Arg. at 19. But a load expressed as a quantity per day is no different from a daily load, and we have never held that Congress must repeat itself or use extraneous words before we acknowledge its unambiguous intent.<sup>48</sup>

The D.C. Circuit's conclusion that the literal language of the statute does not lead to an absurd result appears to be more focused on Congress's intent than the Second Circuit's, which seems to have been more concerned with accommodating the EPA's desire to create a workable regulatory regime. The normative principle that Congress's intent should be of paramount concern in statutory interpretation and application is

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<sup>48</sup> 446 F.3d at 144.

exemplified by the Supreme Court's decision in *Massachusetts v. EPA*, and by the Seventh and D.C. Circuits' decisions regarding the TMDL program.

#### B. Evolution of the *Chevron* Doctrine

The *Chevron* doctrine, under which in some circumstances courts are supposed to defer to agency decisions of statutory interpretation, has also turned sharply, although not unambiguously or completely, toward congressional primacy. The *Chevron* doctrine is probably the most analyzed administrative law doctrine in history, so I will not take too much space to spell it out except as necessary to show how it has developed over the years. Although the *Chevron* doctrine is often thought of as a doctrine requiring a very high level of deference to administrative agencies, in application, it has become largely a device for maintaining congressional primacy in contested matters of statutory meaning.<sup>49</sup>

The *Chevron* doctrine, created by the Supreme Court in 1984,<sup>50</sup> establishes a two-step process for judicial review of agency decisions on pure questions of statutory construction. The first step states that if Congress has “directly spoken to the precise question at issue,” everyone, including the agency and the reviewing court, is bound by Congress's pronouncement.<sup>51</sup> There is no deference to an agency interpretation that is contrary to Congress's clearly expressed intent. If Congress has not directly spoken to the precise question at issue, then the reviewing court in step two is supposed to defer to any reasonable or permissible interpretation by the agency.<sup>52</sup> This is intended to be a

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<sup>49</sup> I agree with Linda Jellum that *Chevron* no longer has much of an affect on statutory interpretation. In my view, this is due to the principle that everyone, courts and agencies, should follow Congress's intent as best as possible when construing statutes. See Linda Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 Admin. L. Rev. 725 (2007).

<sup>50</sup> See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

<sup>51</sup> Id. at 842-43.

<sup>52</sup> Id. at 843. See also *Household Credit Services, Inc. v. Pfennig*, 541 U.S. 232, 239 (2004).

very deferential standard, and it has proven to be so in practice. Thus, the key to whether the *Chevron* two step process results in greater deference to agency interpretations than under prior law lies largely in the application of step one. If courts move on to step two whenever the statute does not explicitly address the exact issue<sup>53</sup> under review, then *Chevron* would result in significantly expanded deference to agencies.

While recent developments appear to represent a return to more genuine attention to congressional intent, in retrospect, the origins of the *Chevron* doctrine implicate a rejection of the expressed intent of Congress in the name of an apparently fictional account of a meta-intent on the part of Congress to allocate interpretive authority to administrative agencies whenever a statute delegating authority to an agency is either incomplete or ambiguous. The text of the Administrative Procedure Act indicates the opposite, that the reviewing court is to decide all questions of law,<sup>54</sup> although of course the methodology for making those decisions is not indicated. If the law at the time the APA was passed had prescribed a clear methodology for judicial review of agency statutory interpretation, then there would have been a strong argument that, absent an indication to the contrary, the APA should be understood to incorporate that understanding. Unfortunately, there was no clarity in the law at the time, with Supreme Court decisions pointing in various directions on how much deference agency interpretations should receive.<sup>55</sup> In light of the divergence in authority on the question in

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<sup>53</sup> By “exact issue” what I mean is that the statute answers the precise question under review in so many words. For example, in *Chevron*, the issue was whether the EPA could use what is referred to the “bubble” concept and count all pollution emitting elements of an industrial complex as a “stationary source.” On the narrowest view of step one, the only way that the case would be resolved in step one would be if the statute actually mentioned the bubble concept, for example by stating explicitly that “the EPA may treat all of the sources of air pollutants in an industrial complex as a single stationary source.”

<sup>54</sup> APA §706.

<sup>55</sup> See, e.g., *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (affording no deference on abstract question of law but prescribing strong deference on application of law to particular facts in formal agency

the pre-APA period, the most one can say based on statutory language is that the text, by instruction reviewing courts to decide “all questions of law”, points modestly against deference to agency statutory interpretation.<sup>56</sup>

While there are times when Congress obviously delegates interpretive authority to agencies, in the typical case of ambiguity or unanticipated statutory gaps there is no real reason to suppose that Congress would have preferred agency interpretation to judicial interpretation. The Court’s invocation of congressional intent in support of what at the time appeared to be a startling new deferential standard of review reinforces the normative primacy of Congress, but it does so at the expense of raising suspicion about the faithfulness of the Court as an agent of congressional intent.

The Court also relies on an apparently fictional account of congressional intent in establishing the domain of *Chevron*, i.e. when the *Chevron* doctrine applies.<sup>57</sup> Under what has been called *Chevron* step zero, before applying the *Chevron* doctrine, the reviewing court must determine whether the *Chevron* framework applies to the particular agency interpretation under review. The entire inquiry is wrapped in a cloak of congressional intent because, as the Court puts it, *Chevron* applies only when Congress intends to empower the agency the power to make interpretations that have the force of law. While the Court has expressly disavowed limitations on the factors relevant to

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hearing); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (prescribing deference to informal agency interpretations on a sliding scale based on consideration of the totality of the circumstances); *United States v. American Trucking Assns., Inc.*, 310 U.S. 534 (1940) (statutory interpretation is a judicial function); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294 (1933) (deferring to agency statutory construction).

<sup>56</sup> Cf. Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 Harv. L. Rev. 467 (2002) (describing pre-APA conventional understanding that when Congress prescribes penalty for violating agency rule, agency rule is thought to have “force of law” meriting deference).

<sup>57</sup> See William Jordan III, *Chevron and Hearing Rights: An Unintended Combination*, xxx Admin. L. Rev. xxx (forthcoming 2009).

whether *Chevron* applies, the main criterion that the Supreme Court applies to this is the formality of agency process, not explicitly because more formal processes tend to lead to more reliable results but rather because when Congress prescribes a relatively formal process, this formality is purportedly indicative of Congress's intent to delegate to the agency the power to issue interpretations with the force of law.

It is exceedingly difficult to evaluate whether the formality criterion, or any factor other than the text or legislative history of a particular statute or the APA, accurately reflects congressional intent regarding the status of agency interpretations. The Court's most important opinion on this matter makes it clear that the doctrine is built on an assumption concerning Congress's intent, not actual evidence of that intent.<sup>58</sup> No opinion of the Court cites direct evidence such as statutory language, legislative reports or legislative debates for the relevance of formality to that inquiry. Further, although there are suggestions in early decisions that procedural formality may be relevant to the deference issue,<sup>59</sup> the Court does not offer a shared tradition that procedural formality signals congressional intent to delegate, so that Congress might be presumed to have legislated against that background.<sup>60</sup> Rather, the criterion seems to fit the Court's own logic about when agency interpretations should receive *Chevron* deference, regardless of congressional intent. What we end up with is a suspicious invocation of congressional

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<sup>58</sup> See *United States v. Mead Corporation*, 533 U.S. 218, 230 (2001) ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.") The citation in the footnote attached to this statement is to *Merrill and Watts*, *supra* note x, but only for the point that Congress's intent should govern. It provides no support for the argument that procedural formality is indicative of Congress's intent. See *Mead*, 533 U.S. at 230 n. 11, citing *Merrill and Watts*, *supra* note x.

<sup>59</sup> See *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944) (mentioning lack of procedural formality as a factor against deference but then going on to state that lack of adversary proceedings does not mean that agency interpretation is not entitled to "respect").

<sup>60</sup> See *Merrill and Watts*, *supra* note x.



intent to justify the *Chevron* doctrine in the first place, i.e. that Congress intended to delegate to agencies the power to fill implicit statutory gaps, and then building on this fictitious edifice, the scope of the doctrine is delineated based on further fiction, that Congress intended to mark out the scope of this doctrine based on the formality of the procedures prescribed for agency action.

What does the fact that the foundation of the *Chevron* doctrine consists of a false invocations of congressional intent say about congressional interpretive primacy? On the one hand, it may seem to weaken the claim that the most important factor in most interpretive controversies is the intent of Congress. On the other hand, it illustrates the normative hold of the principle that Congress's intent *should* matter. Without the pull of that normative principle, the Court could have constructed and defended the *Chevron* doctrine as the most normatively attractive allocation of interpretive authority between the courts and agencies. Apparently, the Supreme Court believes that the legitimacy of its judicial review jurisprudence depends on the imprimatur of Congress.

Perhaps because of the weak basis for *Chevron* in congressional intent, in the years since the *Chevron* standard was announced, the Court has moved away from deference to agency statutory interpretations toward a more traditional Court-centered approach with the focus on congressional intent. The principal manifestation of this change has been a significant expansion of the scope of step one, so that many more interpretive questions are resolved based on clear congressional intent than might be anticipated by the original doctrine's requirement that Congress have addressed the "precise question at issue." Rather than look only at the bare words of the statute to determine whether Congress addressed the precise issue under review, the Supreme Court

quickly backed away from that extreme view of *Chevron* and explained that courts reviewing agency statutory interpretation should use the “traditional tools of statutory interpretation” to determine Congress’s intent.<sup>61</sup> This allows reviewing courts to decide cases in step one even with little or no indication that Congress focused on the particular issue or had a specific intent one way or the other on the particular issue.

The “traditional tools” version of *Chevron* has moved the law so far away from the original narrow understanding of *Chevron* step one that it is now difficult to discern a difference between *Chevron* step one and traditional, pre-*Chevron*, statutory interpretation. The best example of the convergence of *Chevron* and pre-*Chevron* practice is the Court’s review of the Office of Management and Budget’s (OMB) conclusion that disclosure rules are subject to the requirements of the Paperwork Reduction Act.<sup>62</sup> The Paperwork Reduction Act requires federal agencies to obtain approval from OMB before they can require private parties to provide information to the federal government.<sup>63</sup> The Department of Labor took the position that the Act does not apply to rules requiring a private party to disclose information directly to another private party. Because OMB administers the Paperwork Reduction Act, OMB argued that its interpretation was entitled to *Chevron* deference. Nothing in the Act explicitly addresses disclosure rules, so OMB had a good argument that this gap in the statute meant that its decision should be reviewed pursuant to *Chevron* step two under which any reasonable interpretation would be upheld. The Court, however, found in light of the structure and purposes of the statute that Congress’s intent to exclude disclosure rules from the Act’s

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<sup>61</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

<sup>62</sup> See *Dole v. United Steelworkers of America*, 494 U.S. 26 (1990). The details in text concerning the Paperwork Reduction Act and the *Dole* decision are drawn from the Court’s opinion in that case.

<sup>63</sup> See 44 U.S.C. § 3501 *et seq.*

coverage was clear. The Court's opinion is virtually indistinguishable from the analysis that would have applied before the *Chevron* doctrine was created except for a brief reference to *Chevron* at the end of the opinion.<sup>64</sup>

Consider also the “extraordinary cases” version of the *Chevron* doctrine under which the Supreme Court rejected both the FCC's conclusion that its power to “modify” the requirements of the Telecommunications Act gave it the power to exempt all long distance carriers other than AT&T from the tariff-filing requirement<sup>65</sup> and the Food and Drug Administration's assertion that the Food, Drug and Cosmetic Act gave it authority to regulate tobacco products.<sup>66</sup> In the telecommunications decision, the Court read the word “modify” to not include the power to cut the heart out of a regulatory system built on tariff filing. In the decision involving tobacco, although tobacco and cigarettes easily meet the definition of drugs and drug delivery devices under the Act, the Court looked at the particular history of tobacco related legislative action across a wide range and concluded, under *Chevron* step one, that Congress clearly did not intend for the general words of the Act to confer power on the FDA to regulate tobacco products. This expansion of *Chevron* step one beyond its original “directly spoken to the precise issue in

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<sup>64</sup> In fact, the Court's only citation to *Chevron* was for the point that “[i]f the intent of Congress is clear, that is the end of the matter.” *Chevron*, 467 U.S. at 842-43, quoted in *Dole*, 494 U.S. at 43. The dissenters complained that it took the Court “more than 10 pages, including a review of numerous statutory provisions and legislative history, to conclude that the Paperwork Reduction Act of 1980 (PRA or Act) is clear and unambiguous.” *Id.* (White, J., dissenting). The implication is that under the original, narrower version of step one, anytime lengthy exposition is necessary, the Court should find ambiguity and move to step two.

<sup>65</sup> *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994).

<sup>66</sup> *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). For a discussion of the extraordinary cases version of *Chevron*, see Cass R. Sunstein, *Chevron Step Zero*, 92 Va. L. Rev. 187 (2006).

question” version means that in more situations, courts will overrule agency interpretations as inconsistent with what it finds to be clear congressional intent.<sup>67</sup>

What does the expanded *Chevron* step one mean for relative power in the struggle for interpretive primacy among agencies, courts and Congress? It seems pretty clear that agency control over statutory meaning is reduced and that either courts or Congress or both are the beneficiaries. The more likely it is that a controversy will be resolved in step one, the less likely it is that the agency’s interpretation will be reviewed under the hyper-deferential step two analysis.<sup>68</sup> However, as between the courts and Congress it is an open question, although the courts continue to view congressional intent as the touchstone of statutory interpretation.

Nonetheless, one could view the evolution toward an expanded step one as the courts seizing power from both the agencies and Congress, deciding cases in step one based on the courts’ preferred interpretations rather than on an honest view of Congress’s intent. I have great sympathy for this view, especially given the Supreme Court’s

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<sup>67</sup> For a spirited defense of a different version of the extraordinary cases *Chevron* step one doctrine, see Abigail R. Moncrieff, Reincarnating the “Major Questions” Exception to *Chevron* Deference as a Doctrine of Noninterference (or Why *Massachusetts v. EPA* Got It Wrong), 60 Admin. L. Rev. 593 (2003). Moncrieff argues that “major questions” should be answered by Congress and thus when the statute does not speak clearly to an important question, courts should not presume that an agency has been delegated the authority to act. Moncrieff argues that under her “Major Cases” exception to *Chevron*, the Supreme Court should have approved of EPA’s decision not to treat global warming gases as air pollutants because the general words of the Clean Air Act were not sufficient to grant the EPA the power to decide to regulate greenhouse gases as air pollutants.

<sup>68</sup> Looking beyond the bare words of the statute does not necessarily mean that the court will overrule the agency. In fact, a court determined to affirm agency interpretations could decide every case in step one in favor of the agency, essentially beating back all challenges to agency interpretations by answering that the agency’s interpretation is compelled by Congress’s intent, which, as we learned in *Chevron*, is “the end of the matter.” For example, the Second Circuit affirmed the EPA’s reading the word “daily” to include seasonal or annual calculations by looking beyond the bare words of the statute and concluding that using a unit of time other than “daily” to calculate permissible pollutant levels “best serves the purpose of effective regulation of pollutant levels in waterbodies.” *Natural Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91, 99 (2d Cir. 2001). In essence, the court attributed to Congress an intent that was inconsistent with the language of the statute in order to approve an agency interpretation that departed from the statutory text. However, most of the time, judicial willingness to look beyond statutory language in step one makes it more likely that the agency interpretation will be rejected as the court constructs statutory meaning from sources other than the text of the statute.

consistent lack of adherence to any recognizable set of principles of legal reasoning or, more particularly, statutory interpretation.<sup>69</sup> The courts have final say in cases that are litigated, and often courts attribute their own views of what the statute should be to the legislature. However, in many cases, courts reviewing agency statutory interpretation at least appear to be trying to do what they think Congress would have wanted in a circumstance that perhaps Congress did not anticipate or at least did not explicitly address. This is especially true in areas, such as the controversy over the scope of the Paperwork Reduction Act, that are not particularly politically charged.

The original version of the *Chevron* doctrine is best viewed as turning judicial attention away from traditional indicia of congressional intent or as limiting judicial power to shape statutes toward their own preferences. At a minimum, expanded step one makes it more likely than it was before that Congress's intent will prevail over the agency's, assuming the agency's policy is inconsistent with Congress's preferences. This would happen either by coincidence or by judicial design. It would happen by coincidence when the reviewing court's views just happened to coincide with the intent or preferences of Congress in an area of uncertainty or ambiguity. There are many areas in which courts and Congress appear to disagree,<sup>70</sup> but there are likely to be others in which reviewing courts are more likely than agencies to interpret statutes the way Congress would prefer. There is also a strong norm in favor of judicial attention to Congress's intent in decisions involving statutory interpretation. It is unclear whether there is a similar norm in the Executive Branch and if so how does the strength of that

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<sup>69</sup> See generally, Beermann, *supra* note x (PILJ forthcoming article).

<sup>70</sup> For a discussion of one such area, civil rights, see Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 Conn. L. Rev. 981-1035 (2002).

norm compare to the strength of the norm in the Judicial Branch.<sup>71</sup> The question is the relative one of which entity, an agency or a court, is more likely to faithfully follow congressional intent when construing a statute. I do not believe there is a general answer to this question. Rather, each situation presents both possibilities. At least some expanded step one cases appear to involve the reviewing court rejecting an agency's interpretation of a statute because, in the Court's view, the agency has gone against Congress's intent or at least more general preferences.

### III. Further Examples Concerning Congressional Primacy in Administrative Law and Related Areas

This Part contains abbreviated discussions of additional examples in administrative law, first those that reflect increased attention to congressional intent and then a few that reflect the opposite, a court turning away from Congress and either accepting an agency position that flies in the face of what Congress appears to prefer or is based on a judicial view without regard to either agency or congressional preferences.

#### A. Additional Areas of Focus on Congress's Intent.

Administrative procedure is an area that purports to be highly influenced by congressional intent, but should also be understood as allowing executive discretion. The *Vermont Yankee* doctrine, which is a pillar of administrative procedure, holds that courts may not require agencies to increase the level of procedure beyond that specified by Congress.<sup>72</sup> Unless there is a constitutional violation, such as a lack of due process, a

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<sup>71</sup> In a study of agency practice after *Chevron*, the author concluded that the agency took *Chevron* as a license to be much more adventurous in statutory interpretation, not as a reason to pay more attention to congressional intent. See E. Donald Elliot, *Chevron Matters: How the Chevron Doctrine Redefined the Roles of Congress, courts and Agencies in Administrative Law*, 16 Vill. Envtl. L.J. 1 (2005).

<sup>72</sup> See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

court cannot require an agency to increase procedure beyond that specified in the APA and other applicable statutes, even if the reviewing court believes that the level of procedure appears insufficient due to the complexity or importance of the matter before the agency. The *Vermont Yankee* rule cedes control over administrative procedure to Congress and the agencies. The rule is founded upon the Court's conclusion that Congress intended to leave it virtually completely to agency discretion whether to provide procedural protections beyond those specified in the APA. Unlike the *Chevron* doctrine, the Court actually has some evidence that Congress intended to delegate discretion to the Executive Branch.<sup>73</sup> While the lower courts have not followed *Vermont Yankee* to the letter, the Supreme Court has not approved the practice some lower courts have engaged in of requiring procedures not specified in the APA, and it has not approved (or even reviewed) the more adventurous lower court interpretations of the APA.<sup>74</sup>

The Court has also approved of a great deal of congressional control of agency action through its standard for determining whether Congress has usurped the judicial role by statutory intervention into the process of judicial review<sup>75</sup> or has instead acted within the legislative power by simply changing the law during the pendency of judicial review. In the most recent case raising this issue, while judicial review of agency timber cutting plans in the Pacific Northwest was pending, Congress attached a provision to an appropriations bill approving the agency plans, stating in the statute that the agency plans

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<sup>73</sup> See *Vermont Yankee*, 435 U.S. at 544-46 (discussing legislative reports on the APA).

<sup>74</sup> See Jack M. Beermann & Gary S. Lawson, *Reprocessing Vermont Yankee*, 75 Geo. Wash. L. Rev. 856, 882-901 (2007).

<sup>75</sup> See *United States v. Klein*, 80 U.S. 128 (1871) (holding that Congress may not alter the legal effect of a presidential pardon).

did not violate any of the provisions of federal law relied upon by the challengers.<sup>76</sup> The statute explicitly referred to the pending actions for judicial review by case name and number and it listed the statutes relied upon in those cases.<sup>77</sup> The challengers had a strong argument that this statute violated constitutional limits on Congress's power to intervene in pending litigation, especially since Congress mentioned the pending cases and the statutes involved. The Court, however, rejected the challenge and concluded that Congress had in effect changed the law by creating one-time exceptions to the federal statutes involved in the litigation.<sup>78</sup> The references to the pending cases and the particular statutes were, according to the Court, for convenience, and did not amount to congressional usurpation of the judicial role. This decision preserves to Congress a great deal of authority over the substance of administrative determinations.

The Court's treatment of the general reviewability of enforcement discretion also depends, in large part, on the Court's view of congressional intent. As discussed above, there is a general presumption that agency decisions not to bring enforcement action against a particular party are not reviewable, because ordinarily there is no law to apply in such situations. Congress, according to the Court, legislates against this background understanding. But, when Congress prescribes criteria governing the agency's decision whether to take enforcement action, the Supreme Court has concluded that judicial

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<sup>76</sup> *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992)

<sup>77</sup> See Department of the Interior and Related Agencies Appropriations Act, 1990, § 318, 103 Stat. 745 discussed in *Robertson*, 503 U.S. at 438.

<sup>78</sup> *Id.* at 438–39. In most states, there would be a strong argument for unconstitutionality under state constitutional “special legislation clauses” which require legislatures to enact only general laws and prohibit laws that are too specific. See, e.g., Illinois Constitution, Article IV, § 13

The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.

The United States Constitution and the constitutions of the New England states do not contain special legislation clauses.



review of the refusal to enforce is available under the factors specified in the statute as governing the decision.<sup>79</sup> A court less attentive to congressional intent might have adopted a categorical bar to review of enforcement discretion, as Justice Scalia apparently would prefer. Congress, not the reviewing court or the agency, has the final say on whether judicial review of enforcement decisions should be available and on what criteria.

The Courts have also not been willing to extend the effect the National Environmental Policy Act (NEPA)<sup>80</sup> beyond what was actually passed in Congress, essentially validating the limited scope Congress intended this law to have. Based on relatively clear statutory language, the Court has construed NEPA to require only identification and consideration of environmental effects, and not to require that environmental concerns actually be determinative.<sup>81</sup> When the government proposes undertaking covered activities, NEPA requires two things, first that an environmental impact statement be prepared and second that the statement be part of the record of the proposal.<sup>82</sup> While NEPA anticipates that the environmental impact statement be considered, it does not require that negative environmental effects be part of the decisionmaking balance. Even if an unimportant project would have disastrous environmental effects, NEPA does not require abandonment of the project as long as the impact statement is complete and the effects were considered.

Another similar area is implied private rights of action under federal regulatory statutes. The issue involves whether a private party injured by another private party's

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<sup>79</sup> See *Dunlop v. Bachowski*, 421 U.S. 560 (1975).

<sup>80</sup> 42 U.S.C. § 4321 *et seq.*

<sup>81</sup> See *Stryker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980).

<sup>82</sup> 42 U.S.C. § 4332,

violation of a federal regulatory or criminal statute should be able to sue that private party in federal court for damages when the statute itself provides only for government enforcement, not private actions. In the 1960s, the federal courts, with the Supreme Court's approval, would allow private actions for damages under regulatory statutes when the private action would advance the overall purposes of the statute.<sup>83</sup> More recently, the Court has tightened up and allowed private rights of action only when it is clear that Congress intended there to be one.<sup>84</sup> Justice Powell, in dissent from a decision allowing a private right of action under an anti-discrimination provision of a federal funding statute, argued that allowing a private right of action without evidence of congressional intent amounted to judicial usurpation of the legislative function.<sup>85</sup> In more doctrinal terms, because Congress sometimes explicitly provides for private rights of action, there is a strong legal argument against implying the right of action under a statute when Congress has not provided for one. Requiring evidence of congressional intent before implying a right of action makes Congress and not the courts responsible for the decision whether to create a private right of action.

Another area in which the courts have, to a certain extent, sided with Congress in inter-branch squabbles has been with regard to the legality of Executive Orders and similar presidential actions. In the national security area, the Supreme Court has not allowed the President to ignore the law when establishing the contours of the detention

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<sup>83</sup> See, e.g., *J.I. Case v. Borak*, 377 U.S. 426 (1964).

<sup>84</sup> As the Court stated very recently, “[t]hough the rule once may have been otherwise, see *J.I. Case Co. v. Borak*, 377 U.S. 426, 432-433 (1964), it is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one[.]” *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 128 S. Ct. 761 (2008).

<sup>85</sup> See *Cannon v. University of Chicago*, 441 U.S. 677, 746 (1979) (Powell, J., dissenting).

and hearing process in the ongoing “war on Terror.”<sup>86</sup> The Court has stood firmly for the principle that the law (made by Congress) constrains executive action even in areas with national security implications. Further, in areas outside the national security area, it is clear that the President does not have the power to issue Executive Orders that are inconsistent with governing statutes or treaties.<sup>87</sup> While there are areas of great uncertainty, such as the scope of Executive Privilege to withhold information and testimony from Congress, the binding force of legislation requiring the President to consult with Congress over the use of military force and the host of issues raised in signing statements that became an issue during the George W. Bush administration, the guiding principle seems to be congressional primacy.

I could go on identifying areas in which responsibility for important decisions lies in Congress. In many of these areas, the appeal to congressional intent seems genuine, and the Court’s concern for Congress’s proper role is more consistent with traditional notions of separation of powers than the stronger claims of executive or judicial authority to act without affirmative evidence of congressional intent.

#### B. Areas of Ambiguous or Reduced Concern for Congressional Intent.

There are also areas in which the Supreme Court appeals to congressional intent do not seem genuine. For example, its jurisprudence in preemption cases, in which a defendant in a state tort action argues that federal regulatory approval preempts state tort law, relies on what appears to be a fictional account of Congress’s intent employed as a

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<sup>86</sup> See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (holding military commissions unlawful because they were inconsistent with federal and international law).

<sup>87</sup> See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (holding unlawful and unauthorized an 1850 executive order requiring American Indians to leave lands recognized by treaty as theirs); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding unlawful executive order requiring Secretary of Commerce to seize steel mills in wartime).

smokescreen for judicial policymaking. The Supreme Court has been finding preemption on the plausible ground that when a federal agency regulates, for example by approving the marketing of a medical devices, state tort law that would brand the same device as defective is inconsistent and must give way to superior federal law.<sup>88</sup> The problem with this reasoning is that it is often inconsistent with the intent of Congress. This has been a very controversial issue because it cuts across so many areas including tort reform, federalism and regulatory policy. The appeal to congressional intent to justify preemption is especially hollow when the Court finds preemption even though the regulatory statute contains a savings clause which explicitly preserves state common law remedies.<sup>89</sup> In many situations, it appears the Congress intended to impose a minimum level of safety for products marketed in interstate commerce, but intended to leave it to the states to determine whether a federally-approved product met common law products liability standards.<sup>90</sup> The Court's preemption jurisprudence has veered away from congressional intent toward the Court's (and the G.W. Bush administration's) policy views on products liability.<sup>91</sup>

Another area of administrative law in which the Court's attitude toward Congress is ambiguous and may not reflect genuine concern for congressional primacy is standing. Even a Court that seems to relish imposing new limits on standing acknowledges that Congress has a role to play in determining whether a particular party has standing to

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<sup>88</sup> See *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008).

<sup>89</sup> See *Geier v. American Honda Motor Co.*, 529 U.S. 861, 868 (2000) (finding preemption even though Congress explicitly provided that "[c]ompliance with' a federal safety standard 'does not exempt any person from any liability under common law.' 15 U.S.C. § 1397(k) (1988 ed.).")

<sup>90</sup> See Mary J. Davis, *The Battle over Implied Preemption: Products Liability and the FDA*, 48 B.C. L. Rev. 1089, 1111-19, 1134, 1142-44 (2007).

<sup>91</sup> See Davis, *supra* note x at 1095 (characterizing agency preemption policy as "new" in 2004); Evelyn Pringle, Daniel Troy - Bush Administration's Preemption Gang - Part II, available at <http://www.lawyersandsettlements.com/articles/10030/bush-preemption-troy.html>.

challenge agency action.<sup>92</sup> Normally, a challenger to government action lacks standing unless she can show that if her challenge succeeds, the negative effects of the government action on her will be eliminated or lessened.<sup>93</sup> The Court has allowed, however, that when Congress grants an affected party a procedural right, for example to participate in the process leading up to the project, or to insist that an adequate impact statement be prepared in connection with the project, that person has standing to challenge the adequacy of the process or statement.<sup>94</sup> Standing is available even though the challenger could not credibly argue that the government action would have been different had the proper procedure been followed or the impact statement had been adequate.<sup>95</sup> This allows Congress to grant administrative process rights that reviewing courts will recognize as sufficient for standing to challenge agency action, assuming the constitutional injury requirement for standing is met.<sup>96</sup> This recognition, however, is a minor element in a doctrine that largely prevents Congress from extending standing beyond the Court's views of the proper scope of Article III.

#### IV. Increasing Congressional Responsibility

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<sup>92</sup> Compare *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000) (allowing standing for uninjured party to pursue False Claims Act action against state agency in the name of the United States) with *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (not allowing uninjured party to pursue citizens suit against federal agency)

<sup>93</sup> See generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>94</sup> See *id.*, 504 U.S. at 573 n. 7 (“Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.”)

<sup>95</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 n. 7 (1992).

<sup>96</sup> *Id.*

In keeping with the title of the panel for which this article was written, I thought it would be appropriate to discuss whether there are ways in which Congress can become more responsible in the sense of improving its performance in relation to some of the areas discussed above, perhaps to reduce some of the legal uncertainty that is evident in the discussion. This is by no means even close to an exhaustive presentation of the reforms that would make Congress more responsible. Rather, my intent is to highlight some areas that are ripe for improvement. Before getting to specifics, however, some general comments are in order.

In administrative law, Congress has contributed to several well-known problems. First, regulatory statutes are often ambiguous in ways that may be attributable to weaknesses in the political process. While some degree of ambiguity is unavoidable, there are many situations in which Congress appears to leave ambiguities in order to facilitate the passage of the statute. This leaves it to the Executive Branch and the courts to work out issues sometimes of great importance and difficulty. Proponents of a strict nondelegation doctrine find this common practice normatively unacceptable—the legislature should be making the most important and controversial normative decisions, not passing them off on the less accountable organs of government.<sup>97</sup>

A second, related problem is that the foundational administrative law statutes are obscure on important issues. This difficulty is pervasive in administrative law. For example, the key question in the global warming case was whether, and if so on what standard, are EPA decisions not to engage in rulemaking reviewable. The APA requires agencies to provide a procedure for allowing members of the public to petition for the

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<sup>97</sup> See David S. Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993).

issuance of a rule, but the APA is unclear on whether, when and how the agency must respond<sup>98</sup> and on whether the response is subject to judicial review.<sup>99</sup> This is an important matter, involving as it does whether the Executive Branch can avoid legal controls over the allocation of agency attention and resources.

Another overarching problem is the campaign finance system. Here, the blame is to be laid at the feet of the Supreme Court, which has prevented Congress from effectively regulating the role that money plays in the political process, leading to all sorts of policy distortions that show up across the board.<sup>100</sup> Of course, the fact that Congress is the entity that must pass any reforms is cause for suspecting that Congress would choose only reforms that would tend to perpetuate incumbency. I recall a speech that President Gerald Ford gave at the National Press Club in which he attributed continued Democratic control over Congress to PAC money, and he lamented that Republicans agreed to the PAC system as part of post-Watergate campaign finance reform because they thought that the money would flow to them, not realizing that it would go to incumbents first. It may be that Congress would design any campaign finance system to benefit incumbents, but there is certainly a chance that with regard to an issue of such widespread public interest with obvious principles at stake, Members of

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<sup>98</sup> APA §555(e) requires agencies to provide a prompt response to a petition filed “in connection with an agency proceeding,” but it is not clear that if a member of the public simply files a petition requesting a rulemaking that the petition is “in connection with” any proceeding.

<sup>99</sup> *Massachusetts v. EPA* settled the matter, but the APA is not clear on the issue. The APA provides for judicial review of “final agency action for which there is no adequate remedy in a court.” APA § 704. Often, agencies respond to petitions by stating that the matter is still under consideration and rulemaking (or other action) would be premature. It is unclear whether such a response should be treated as a final denial of the petition subject to review under the APA. For the difficulty in determining whether tentative answers to petitions are reviewable, see *Public Citizen Health Research Group v. Chao*, 314 F.3d 143 (3d Cir. 2002); *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *Environmental Defense Fund v. Ruckelshaus*, 439 F. 2d 1093 (D.C. Cir. 1971).

<sup>100</sup> See *Buckley v. Valeo*, 424 U.S. 1, 12-59 (1975) (upholding federal individual campaign contribution limits while striking down expenditure limits); *Randall v. Sorrell*, 548 U.S. 230 (2006) (striking down state campaign contribution and expenditure limitations).

Congress would effectively tie themselves to the mast so they could resist the call of special interest money and do what is good in broader public interest.<sup>101</sup>

The final institutional reform I suggest has to with congressional review of administrative regulations. For Congress to be truly responsible for the administrative state, it must monitor and supervise the process of administrative rulemaking and administrative policymaking more generally. In recent decades, since Ronald Reagan, Presidents have been much more effective at this, which has led to a greater appreciation of the political accountability of agencies through the President.<sup>102</sup> Congress has not been systematic in its review of regulations in way that is sufficient to counteract the increased presidential influence. This tends to reduce the legitimacy of regulation in two ways. First, it reduces democratic (note the small “d”) influence over the regulatory process when the only accountable official is the President. Second, in the extraordinary case in which Congress does get involved in the regulatory process, suspicions of interest group influence can be raised regarding what motivated Members of Congress to take off the blinders and pay attention in this particular case.<sup>103</sup>

Congress took a step in the right direction with the Congressional Review Act of 1996.<sup>104</sup> The Act requires agencies to submit their major rules to Congress sixty days

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<sup>101</sup> It does not look good for consensus on campaign finance reform at this very moment. On November 12, 2008, the Republican Party sued the Federal Election Commission to ease restrictions on coordinated spending between parties and candidates. The restrictions are based on the McCain-Feingold campaign finance law. It is not surprising that the party waited until after the presidential campaign to take this action which may have been embarrassing to presidential candidate John McCain. See <http://content.usatoday.com/topics/topic/Organizations/Government+Bodies/Federal+Election+Commission>

<sup>102</sup> See generally Elena Kagan, Presidential Administration, 114 Harvard Law Review 2245 (2001).

<sup>103</sup> I should note that I do not believe that Congress actually is blind to much of what goes on the administrative world. There is a great deal of congressional supervision of administrative agencies. See Jack M. Beeermann, Congressional Administration, 43 San Diego L. Rev. 61 (2006). The supervision could be improved, however, if it was more centralized, systematic and supported by a dedicated professional staff.

<sup>104</sup> Congressional Review Act of 1996. (P.L. 104-121), codified at 5 U.S.C. §§ 801-808.



before they can become effective in order to allow Congress to consider whether to reject a rule pursuant to an expedited legislative process. Although the possibility of congressional rejection may affect the shape of rules, by and large the Act has not been very successful, perhaps owing to the requirement that any resolution rejecting a rule must be presented to the President in order to become law. Presidential veto is likely to be a real possibility given that the President is behind major rules issued by agencies especially in a context that is politically charged enough that a rule might be rejected by Congress. The only successful use of the Act was when a Republican Congress rejected OSHA's ergonomics rule which was promulgated during the Clinton administration.<sup>105</sup> The rule was issued so late in the Clinton administration that by the time the resolution rejecting the rule was passed in Congress, a new Republican President had taken office, and he was happy to sign a law rejecting the product of his predecessor.<sup>106</sup> It is only at the very end of an administration that Congress might be able to anticipate that a resolution rejecting a rule would not be vetoed.

Congress should take a cue from the various state legislatures that have institutionalized and professionalized their review of administrative rules under the Joint Committee on Administrative Rulemaking (JCAR) model.<sup>107</sup> In many states, legislative

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<sup>105</sup> Ergonomics Rule Disapproval, Pub. L. No. 107-408, 115 Stat. 7 (2001) (joint resolution disapproving the ergonomics rule submitted by the Department of Labor).

<sup>106</sup> See Statement by the President, Office of the Press Secretary, The White House (Mar. 20, 2001), *available at* 2001 WL 273110.

<sup>107</sup> See, e.g., 5 Ill. Comp. Stat. § 100/5-90 et seq. (establishing and describing the Illinois Joint Committee on Administrative Rules). The Committee's website, <http://www.ilga.gov/commission/jcar/>, drawn from the Illinois Blue Book describes the Committee as follows:

The Joint Committee on Administrative Rules is a bipartisan legislative oversight committee created by the General Assembly in 1977. Pursuant to the Illinois Administrative Procedure Act, the committee is authorized to conduct systematic reviews of administrative rules promulgated by state agencies. The committee conducts several integrated review programs, including a review program for proposed, emergency and peremptory rulemaking, a review of new public acts and a complaint review program.

review of regulations is channeled to a joint bi-partisan committee of both legislative houses. The committee has a professional staff to advise the legislators on the rules that come through. Because all rules go through this system, the legislature is responsible for them—responsibility for any rule that survives the JCAR process is shared between the executive and legislative branches of government. These review processes tend to have provisions that might be contrary to the federal Constitution. They allow the committee to suspend the effective date of final rules to allow the full legislature to consider whether to reject them. This might run afoul of the bicameralism and presentment requirements of the Constitution as understood by the Supreme Court,<sup>108</sup> although it is not beyond the realm of possibility that the Court would react favorably to allowing a committee's action to suspend the effective date of a rule for a short period of time, with the understanding that only the full legislature (with presentment to the President) can reject a rule permanently.

When I was doing research on this subject for a state legislative committee, I called the office of the JCAR in Illinois. A very nice woman with an obvious southern accent helped me understand how the process worked. At the end of the conversation,

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The committee is composed of 12 legislators who are appointed by the legislative leadership, and the membership is apportioned equally between the two houses and the two political parties. Members serve two-year terms, and the committee is co-chaired by a member of each party and legislative house. Support services for the committee are provided by 25 staff members.

Two purposes of the committee are to ensure that the Legislature is adequately informed of how laws are implemented through agency rulemaking and to facilitate public understanding of rules and regulations. To that end, in addition to the review of new and existing rulemaking, the committee monitors legislation that affects rulemaking and conducts a public act review to alert agencies to the need for rulemaking. The committee also distributes a weekly report, the *Flinn Report*, to inform and educate Illinois citizens about current rulemaking activity, and maintains the state's database for the *Illinois Administrative Code* and *Illinois Register*.

<sup>108</sup> See *INS v. Chadha*, 462 U.S. 919 (1983).

she said she wanted to tell me about a terrific legislator who was heavily involved in the process—Barack Obama, pronouncing Barack to rhyme with rack and Obama to rhyme with the “bam” in Alabama. She concluded by saying “he’s going to be President some day.” Perhaps President Obama will use this experience to lead Congress to take a more responsible role in reviewing the output of the administrative state, even though it could undercut the control recent Presidents have exerted in that arena.

The JCAR model would make for a more “responsible” Congress in two senses of the word. First, in the sense that was probably meant when this panel was named, Congress would do a better job of agency oversight, especially with the aid of a professional staff. Second, the buck would more realistically stop with Congress, since by reviewing all agency rules, Congress would truly be responsible for the output of the agencies. Concerted attention by Congress to agency rules would increase the legitimacy of agency rulemaking, since Congress would be an active partner in the process and could not credibly feign surprise when confronted with an undesirable agency rule.

The JCAR model is nowhere near a complete solution to the problem of oversight. It typically applies only to rules, and it might be unrealistic in terms of the volume of activity to expand it to include things like agency guidances, decision letters and other less formal but more common modes in which agency policies are expressed. Also, it does not answer the problem of agency inaction. Congress could empower the joint committee to look at areas of inaction and propose legislation setting deadlines with funding consequences so that agencies cannot frustrate Congress’s policies through inaction. The JCAR model should also probably be expanded to include potentially important adjudicatory rulings such as those of the National Labor Relations Board,

Federal Trade Commission and International Trade Commission. Congress might not be able to intervene during the proceedings, but it could react afterwards, even while the particular case is still in judicial review.

In addition to these large structural issues, there are a few particular ways in which Congress could be more responsible for the output of the administrative state to improve the quality and legitimacy of the administrative process. One of the first things Congress should do is fund the Administrative Conference of the United States. The Administrative Conference was an agency dedicated to studying administrative law and making recommendations for action by Congress and agencies. It helped produce important reforms including negotiated rulemaking. It was abolished in the 1995, when administrative law judges used their influence in Congress to defund the agency in reaction to a report that was critical of the performance of administrative law judges.<sup>109</sup> The American Bar Association Section on Administrative Law and Regulatory Policy has taken up some of the slack and has produced some recommendations for administrative law, but ACUS would have more credibility and more resources. The Administrative Conference would provide Congress with trustworthy suggestions for reform at a relatively low cost which might help overcome some of the political resistance to reform of the administrative process and the APA.

Congress should remain actively involved in reviewing regulations even if it does not adopt the JCAR model. It should use its oversight powers to stay informed of developments, and it should not be shy about legislating its preferences. Whenever there is an important issue pending before the courts, if politically possible, Congress should weigh in legislatively. Appropriations riders are one method of doing this, although they

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<sup>109</sup> See Cass, Diver & Beeermann, *Administrative Law: Cases and Materials* 455 (5<sup>th</sup> ed. 2006).

are subject to criticism as unsystematic and sometimes ill-considered. But when Congress adopts an appropriations rider approving or disapproving a particular agency action, Congress has done a better job of taking responsibility for the administrative state than if it confines its attempts at influence to informal contacts and committee hearings. Earmarks may be another story—although earmarks do involve direct congressional involvement in spending decisions, they are infected with the stench of backroom politics and abandonment of sensible standards. These costs probably render earmarking an undesirable method of overcoming the lack of agency responsiveness and accountability.

Congress would do well to clarify legislatively some of the difficult issues that were lurking below the surface in the global warming case and other cases and which are likely to surface in other cases. Congress should add a provision to the APA clarifying the procedure agencies must follow when they receive a petition for rulemaking and a provision specifying the standard of review (or whether the general arbitrary and capricious standard applies.) Even if Congress is generally happy with the current consensus among the Supreme Court majority and the D.C. Circuit, that could easily change especially given that one vote could change the majority in the Supreme Court. We should not allow important issues like this to rest on the vote of one, politically insulated, judge.

Congress ought to answer legislatively the mind-numbing questions that *Chevron* has left in its wake. Does Congress really mean to delegate interpretive authority to agencies whenever a statute is incomplete or ambiguous, or did Congress mean what it said when it prescribed in the APA judicial resolution of all questions of law? If Congress does mean to delegate authority, Congress ought to legislate on the contours of

the doctrine—when should the *Chevron* framework apply? Should it apply to adjudication as well as rulemaking? What about interpretive rules and policy statements where notice and comment is not required? While it may seem odd for a legislature to write rules of interpretation, it is actually relatively common for a legislative body to pronounce general or specific interpretive conventions.<sup>110</sup> Congress should take responsibility for the doctrines that map out the relative competencies of the courts and agencies in matters of interpretation.

There are many more areas in which clarification would be helpful in returning responsibility to Congress. I will mention just one more—preemption of state law in areas of federal regulation. The preemption cases keep on coming to the Court, and Justice Breyer, a veteran administrative law professor has provided the swing vote in moving the Court toward liberal preemption of state law.<sup>111</sup> In recent years, the increased level of preemption has been at the urging of the Bush administration, which has gone farther than previous administrations, and seems more concerned with administration policy than with fidelity to Congress's intent. It may be time for Congress to write a general preemption provision, specifying the circumstances under which it intends to preempt state law and the circumstances under which it does not. At a minimum, Congress should include a preemption provision in each regulatory statute that is likely to create the possibility of preemption, and it ought to specify that courts should not ordinarily imply preemption when the explicit provision does not apply.

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<sup>110</sup> See 1 U.S.C. §§ 1-8 (interpretive conventions); 5 Ill. Comp. Laws ch. 70 (Illinois Statute on Statutes).

<sup>111</sup> See *Medtronic Inc. v. Lohr*, 518 U.S. 470, 503 (1996) (Justice Breyer provides fifth vote against preemption); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) (Justice Breyer provides fifth vote, and writes opinion, finding preemption).

One last word on this—the reforms listed above can be sorted into two broad categories. The first category includes institutional reforms such as better oversight of agency action and campaign finance reform. These are institutional reforms that would contribute to making Congress a better, more responsible, institution. The second category includes legislative clarifications that are necessary because agencies and courts have not been particularly cooperative when it comes to accomplishing the best estimate of what Congress is trying to do in certain situations. If Congress reformed itself institutionally, perhaps it would receive more cooperation from the other organs of government. In that way, it would become a more responsible legislature.